No. 84-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMERICAN COLLEGE OF REAL ESTATE LAWYERS, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a valid zoning regulation can effect a taking of private property for which just compensation must be paid under the Fifth Amendment of the United States Constitution.

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Amicus Curiae has received the parties' oral consent to file this Brief and has confirmed the consent in writing by letters dated November 29, 1984 filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The purpose of the American College of Real Estate Lawyers, as stated in its charter, is to "gather together lawyers distinguished for their skill, experience and high standards of professional and ethical

conduct in the practice of real estate law who will contribute . . . to the best interests of the Bar and general public, . . . to speak upon matters of interest and importance to real estate law and practice, . . ." Accordingly, the College is interested in the outcome of this case because it concerns a fundamental constitutional question about private real estate property rights, as affected by zoning and similar land use regulations, which has never been decided by the Court. That question is whether a land use regulation, valid on its face, can effect a Fifth Amendment taking for which just compensation should be available to the landowner. Because of the profound constitutional issues involved, as well as the important practical ramifications for those persons particularly concerned with real estate law, the College submits its brief as amicus curiae in support of the Respondent.

ARGUMENT

I. This case presents issues which require a decision by the Court on the merits.

The issue before the Court is whether a municipality is required to compensate a landowner whose property has been "taken" by excessive land use regulation (zoning or subdivision controls) commonly referred to as "inverse condemnation." This case arises from the all too familiar problem of zoning and other land use regulations that interfere with, rather than promote, the greater public good.[1]

[1] For a thorough analysis of the question and related issues see Bauman, "The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls," 15 Rutgers Law Journal 15 (1983).

Today, landowners throughout the country are often unable to enjoy fundamental, constitutionally guaranteed property rights because of government land-use regulations which "take" the owner's personal right to the use of the property. In general, good zoning will preserve or enhance land values by preventing incompatible uses and by comprehensive planning to promote the highest and best use of land.[2]

At the time the Court upheld zoning as a proper government tool, the perception was that the inevitable course of unregulated real estate development would result in crowded, oppressive, mixed-use and unplanned growth. The laudable objective of zoning was to avoid this perceived chaotic and uncontrolled development, with benefits flowing to the public and to individual citizens alike. On the other hand, carefully controlled planning would assure that proper regulation would achieve the greatest public benefit without unduly burdening private property rights. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Modern zoning regulations, however, often differ greatly from the early zoning regulations which generated out of the desire to bring order to the chaotic and unregulated growth of urban areas throughout the country.[3] Not only is there little empirical evidence to support the Euclid rationale that zoning

[2] U.S. Department of Commerce, Standard State & Zoning Enabling Act (1926) section 3 [Reported in R. Anderson American Law of Zoning, Section 30.01 (2d Ed. 1977)].

[3] Heyman, Legal Assaults on Municipal Land Use Regulation, 5 Urban Law 2 (1973); Anderson, American Law of Zoning 2d, Section 8.01 at 5 (1976).

protects and enhances property values,[4] but there is great concern that land use regulation as it has evolved in the more than five decades since Euclid, is increasingly being employed to hinder and in some instances to block the most economically efficient use of land.[5]

These extreme forms of regulation, generally enacted without regard for the health, safety and welfare of the community as a whole, frequently end up subsidizing certain favored owners at the expense of others who are either excluded by the lack of housing within their means, or who pay "premium" prices for the restricted housing supply which results from such exclusionary regulation. This kind of zoning is injurious to the public welfare by discouraging the productive use of land and by rewarding speculators in the "down-zoning game" (i.e. favorable zoning changes); this results inevitably in a monopoly on new development and sharp inflation of land prices. The public welfare is harmed when zoning hinders rather than helps efficient free market allocation of housing, employment, commerce and production. This overly restrictive zoning results in forcing unwanted types of development to other municipalities and affords the government entity a bargaining chip in negotiations with landowners seeking permission to develop their property.

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[4] Crecine, Davis & Jackson, Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning, 10 J. Law and Economics 79 (1967); Reuter Externalities In Urban Property Markets: An Empirical Test of the Zoning Ordinance in Pittsburgh, 16 J. Law Econ. 313 (1973); J. McDonald, Economic Analysis of an Urban Housing Market, 159-166 (1979).

[5] Siegan, Regulating the Use of Land in the Interaction of Economics and Law 159, 162, 163 (1977).

Many current zoning regulations and techniques are an outgrowth of the fear that the urban community is expanding and threatening to overwhelm the suburbs.[6] As a result suburban leaders have responded to this fear by using their discretionary zoning power in subtle ways to bar minority and low and moderate income groups from their community.

Currently, landowners seeking relief from the burdens of unduly restrictive zoning ordinances are, with few exceptions, limited to challenging the validity of the ordinance. The invalidation remedy, however, is often inadequate and incomplete, relegating the property owner to the mercies of the offending municipality. Because courts properly defer to legislative discretion in enacting zoning, as in any exercise of the police power, (See Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984); Euclid, supra), a heavy burden of proof is imposed upon the landowner who challenges a regulation to overcome the presumption of validity and convincingly establish that it is not substantially related to the public health, safety and general welfare. Protected from strict review by this judicial deference, municipalities can, with little effort, disguise improper purposes in zoning provisions that have the surface appearance of validity. An excellent discussion of the inadequacy of the validity challenge in dealing with the troubling problem of exclusionary zoning is contained in Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

The cost of litigating such a challenge, especially in light of the difficulties of proof, serves only to further limit the practicality of the remedy. In addi-

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[6] Anderson, American Law of Zoning 2d, Section 8.03 (1976).

tion, invalidation is not an affirmative remedy, and a successful challenge will, thus, leave the owner without any approved plan and still confronted by a municipality with the continuing power to rezone the land. Assuming, not unreasonably, that the municipality will not be forthcoming when it rezones following an owner's successful validity challenge,[6a] it is readily apparent that the situation may deteriorate into repeated challenges and rezoning until the challenge is ultimately unsuccessful or the aggrieved landowner becomes exhausted.

Furthermore, invalidation does not compensate the victorious challenger for the costs or for the interim loss of the full lawful use of the property. As a result, many land owners are either financially unable to protect their constitutional rights in property or, if able to do so, will pass the cost of victory along, thereby inflating housing prices, land costs and rents.

Finally, invalidation does not provide an effective deterrent against regulation which constitutes a taking. This can be avoided only by compelling the municipality to be concerned about potential financial liability and thus causing it to err on the side of non-encroachment on protected rights. Owen v. City of Independence, 445 U.S. 622 (1980). A decision by this Court requiring compensation for regulatory taking would not detract from a municipality's right to regulate reasonably, but rather would serve the salutary purpose of becoming a self-correcting mediator between the deleterious purposes of some members of the local community and the constitutionally protected rights of individuals.

[6a] See San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) n. 22 at 656 (dissent).

Divergent state and federal court interpretations have led to confusion on the question of whether compensation is ever allowed when a regulatory taking occurs (i.e., whether the doctrine of inverse condemnation should be engrafted upon our laws). All of those involved in land use matters along with courts and commentators are awaiting this Court's setting of guidelines for the resolution of this issue. Some courts have concluded that a majority of this Court will adopt Justice Brennan's dissent,[7] while other courts have decided either that the majority will not adopt his position or that the court has not yet squarely confronted the question.[8] The resolution of so important a constitutional issue should not rest on mere conjecture engaged in by lower courts but rather should be based upon the solid authority of this Court's sanction.

A satisfactory resolution of this issue will not occur until this Court directly addresses and rules upon the basic issue of when regulation crosses over into the area of a compensable "taking." The establishment of when and whether inverse condemnation occurs will promote judicial efficiency by providing other courts with guidance as to what remedies are available for a government regulation that results in a "taking" of a landowner's property. The establishment by this Court of certainty about what remedies

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[7] Martino v. Santa Barbara Valley Water District, 703 F.2d 1141, 1148, 9th Cir. (1983); Rippley v. City of Lincoln, 330 N.W.2d 505, 511, N.D. (1983); see also Cases in n.9 infra.

[8] Citadel Corporation v. Puerto Rico Highway Authority, 695 F.2d 31, 33 at Fn. 4, 1st Cir. (1982); Aptos Seascape Corp. v. The County of Santa Cruz, 188 Cal. Reptr. 191, 195 (1982).

are allowed will permit interested persons, including Courts, municipalities and landowners to focus on the fundamental issue of whether or not a particular zoning ordinance results in a "taking." Thus, until this court resolves the issue, commentators and courts alike will continue to deal with the problem on an *ad hoc* basis without the benefit of authoritative guidelines, lawyers will continue costly litigation of the issue, and legislatures will continue enacting newer and more extensive regulations without, in many instances, considering their ultimate impact upon the landowner's private property interests.

Accordingly, we urge the Court to reach the merits of this case and to adopt Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) in its entirety, since this opinion provides not only a legally correct anaysis of the "taking" issue but a practical and fair solution for all parties as well.

II. The Court should affirm the payment of just compensation for a taking effected by zoning regulations.

The decision of the Court of Appeals should be affirmed because the jury's award of just compensation to the Respondent for the loss of the economically viable use of its land, as a direct result of land use regulations imposed by Petitioner, is mandated both by the taking clause of the Fifth Amendment and by the welfare of society as a whole.

The simple clarity of the taking clause has been obscured during the more than half-century of development of the zoning laws since the Court approved the zoning power in Village of Euclid v. Ambler

Realty Co., 272 U.S. 365, in 1926. This has been exacerbated by the fact that the Court has thereafter essentially fallen silent and has left the determination of these matters to the state courts. Without the benefit of any decision by the Court applying the taking clause to zoning and similar land use controls, the law has come to hold that the only remedy generally available to correct a burdensome land use regulation is invalidation, and that just compensation is never required because invalidation is adequate to protect the personal property rights of the landowner.

The Fifth Amendment, however, is unequivocal in requiring that no private property may be taken unless just compensation is paid. It establishes both the right and the remedy, which properly interpreted, should leave no room for the argument that the right may be protected by other remedies chosen at the state's discretion. As Justice Rehnquist said, the constitutional meaning of "just compensation" is the "full and perfect equivalent for the property taken." Penn Central Transportation (Dissent), 438 U.S. 104, 150. While invalidation can often be an adequate and full remedy, as a practical matter, this is not always so. Therefore, just compensation must always be available, as in this case, to protect the landowner against takings effected by land use regulations.

Property rights deserve no less protection than personal rights, because they are so interdependent as to be one and the same. As this Court has said:

> "Property does not have rights, people have rights. The right to enjoy property without unlawful deprivation, no less than the right to

> speak or the right to travel is, in truth, a "personal" right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."
>
> Lynch v. Household Finance Corp., 405 U.S. 538, 552.

This admonition, that personal and property rights are inseparable, is confirmed by the exclusionary impact of some land use regulations on the personal rights of persons who are unable to afford or to maintain a single-family house on a large lot, or on persons who can only afford lower-cost housing such as apartments, attached houses, or mobile homes. These considerations are augmented by evaluation of the impact on the location of places of employment as well as the impact on the kinds of employment available in a community.

Just as the right of persons to be free from illegal search and seizure and involuntary confessions is not protected solely by the exclusionary rule, but is also protected by compensatory damages, so the right to be free from uncompensated taking of property should not be protected solely by invalidation, but should also be protected by compelling the payment of just compensation.

The taking clause, like the other constitutional protections, must be interpreted and applied in order to achieve its true purpose, which is to insure that the majority act with fairness and justice when imposing any burden on the individual citizen, and not in a formalistic or doctrinaire fashion that sacrifies fairness and justice for expediency or mechanical application of legalistic labels. The taking clause is intended to,

> "bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

Petitioner's argument that the jury's verdict awarding compensation must be set aside lest effective land use regulation for the public good be stopped by the potential for monetary liability, emphasizes the wisdom of Justice Holmes' warning in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) against succumbing to the temptation to excuse violations of the taking clause by resort to the police power. He said, referring to it:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
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> Id. at 415-416.

The Court of Appeals was correct in this case to enter judgment on the jury's verdict awarding compensation to Respondent for injury caused by the improper zoning and subdivision regulations involved. The decision is consistent with the Court's holding that valid regulations can, as applied to specific property, result in a taking of that property, or some part

of it, for which just compensation is mandated by the United States Constitution.

The Court should take this opportunity to remove any doubt that the compensable regulatory taking remedy expressly held to be available in other regulatory settings, is also available where land use regulations are involved.

Up to this time the Court has declined to decide whether zoning regulations can result in a compensable taking (inverse condemnation) when this question was presented previously. Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979), aff'd on other grounds, 447 U.S. 255 (1980) (no application for approval, thus no taking); San Diego Gas & Electric Co., supra (no final decision below, thus not reviewable). The Court, however, has given every indication that land use regulations can result in takings for which just compensation should be required. Justice Brennan, speaking for four members of the Court in dissent in the San Diego case, and addressing squarely the issue of compensable land use regulatory taking, which the majority did not do, held that invalidation was not the exclusive remedy and that an otherwise valid regulation can, under a particular set of facts, effect a taking for which just compensation is required by the Fifth Amendment. In his review and analysis of the taking and property regulation cases, Justice Brennan correctly found that the Court has repeatedly acknowledged that regulation can effect a Fifth Amendment taking.

More significant, however, is his observation that a regulatory taking and an eminent domain taking are not basically different in kind, but are essentially similar exercises of governmental control over property. See San Diego, 450 U.S. at 651. Stated differently, it is of no help, in analyzing whether a compensable taking has occurred, to categorize the government action as "regulatory" or "eminent domain" because these are merely convenient, and often misleading, labels for exercises of the government's police powers. Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 2329 (1984). Since any exericse of police power must meet the substantive due process test of substantial relationship to the promotion of the public health, safety and general welfare, there is always a threshold question of validity, but it is not the end of the inquiry, for,

> "If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." San Diego supra 450 U.S. at 656 (Brennan dissent).

Because a finding that a regulation is valid has the same character as a finding that an eminent domain action is for the public use, it follows that a finding of regulatory validity does not answer, but instead begs, the question of whether a taking has been effected. In other words, where a landowner is regulated by valid laws, just compensation may still be had if the regulatory effect on the land constitutes a *de facto* taking. On the other hand, an invalid regulation, not enacted for the public health, safety or general welfare so that there is not, as it were, any "public use," will not afford compensation under the taking clause, but will afford damages for deprivation of property without due process. San Diego,

supra 450 U.S. at 656 n. 23 (Brennan dissent). The reliance by the Court of Appeals on indications that a majority of the Court shared Justice Brennan's view that a valid land use regulation could result in a compensable taking would appear to be justified.[9] Most recently, in a unanimous opinion in a straight condemnation case, the Court observed as follows:

> "We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property, thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived "an owner economically viable use of his land."
>
> Kirby Forest Industries Inc. v. U.S., 81 L.Ed. 1d 1, 13 (1984).

In upholding a landowner's claim for compensation for the burden imposed on her apartment building by a state law regulating the relationships among landlord, tenant, and cable television company, the Court rejected the New York Court of Appeals traditional analysis that the regulation was a legitimate use of police power precluding just compensation, holding that although the regulation was valid,

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[9] In accord, Barbarian v. Panagis, 694 F.2d 476 (7th Cir. 1982); Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir.), cert. denied, 104 S.Ct. 151 (1983); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), appeal dismissed, 455 U.S. 901 (1982), aff'd. on remand, 699 F.2d 734 (1983); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex.Civ.App. 1975).

> "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."
>
> Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3171.

This Court has likewise pointed out in upholding the enactment of the Federal Surface Mining Control and Reclamation Act, providing for regulation of surface mining, that

> "A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . ." Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 296.

If the Court does not intend the foregoing to be applied in the courts of this nation in land use regulation cases, wherein compensation is sought, as the court below did in the instant case, then it must say so now. The Court should take the opportunity presented in the instant case to put to rest any lingering doubts about the availability of just compensation for takings, brought about by excessive land use regulations, by affirming the decision up for review in this case. Here, where the precise question was tried before a jury, for the reasons set forth in Kirby, Loretto, Virginia Surface Mining and Justice Brennan's dissent in San Diego, supra, the determination of the court below should be affirmed.

III. The decision of the Court of Appeals sustaining the jury's finding of a compensable taking is consistent with the law and the evidence.

Having concluded, in principle, that a regulatory taking can occur, the inquiry must then turn to whether, as a matter of fact, a taking has occurred in the instant case. This is "a question of degree—and therefore cannot be disposed of by general propositions." Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416. This remains as true today as when Justice Holmes stated it more than sixty years ago. In a recent (1978) review of the law concerning the question, the Court began by noting that the definition of a "taking" under the Fifth Amendment "has proved to be a problem of considerable difficulty," going on to add that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123-124.

Without in any way limiting the scope of what it conceded to be an essentially case-by-case factual inquiry, the Court identified a few factors from its decisions that had particular significance. Of relevance to the instant case, among these factors, is the economic impact of the regulation, particularly the impact on "investment-backed expectations." Id. at 124. A similar factor has been identified subsequently, namely the deprivation of the economically viable use of the land. Kirby Forest Industries, supra, at 81 L. Ed. 2d 13, citing Agins v. Tiburon. The Court

in Kirby also took occasion to reiterate that the underlying principle that is the pole-star guiding the inquiry is "justice and fairness" in apportioning the burdens of government action that each individual shall bear. Id., at 13.

Given the absence (and the impossibility) of a precise judicial definition of a "taking," the jury's verdict was properly sustained by the Court of Appeals. It would be unwise to substitute judicial findings of fact regarding the taking question for those of a jury where the verdict is supported by the evidence, because as a matter of fundamental jurisprudence, factual determinations are preferably left to a jury, especially where community values such as "fairness and justice" and the relative impact of a governmental action on an individual's private property rights are to be determined, as is true in a regulatory taking case.

Furthermore, where, as here, the factors upon which the claim of taking is based (that is, loss of economically viable use and/or substantial impact on investment-backed expectations) are the same factors that will be used to measure the amount of just compensation to be paid, there is less need to put too fine a point on the taking question in the first instance, because the taking and compensation questions are so intertwined. In Loretto, supra at 102 S. Ct. 3177, the majority, taking note of the argument that the alleged "taking" had the effect of increasing the value of the owner's property and was, accordingly, not in fact a taking at all, observed that the alleged increase in value would also be relevant to the amount of compensation due, and concluded,

> "For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance."

In short, the reviewing courts should not be too ready to hold that no Fifth Amendment taking has occurred because a finer adjustment based on a consideration of all of the relevant factors, can be made (preferably by a jury) in setting the amount of compensation to be awarded.

For these reasons, the Court of Appeals' decision, based on the verdict of the jury, should be affirmed.

CONCLUSION

A remedy awarding "just compensation" would provide the following advantages: it would implement the purpose of the Fifth Amendment, achieve a "fair" outcome, reduce pressures on landowners and courts to use the drastic invalidation remedy to upset comprehensive land-use planning schemes and encourage planning officials to weigh carefully the costs, as well as the benefits, of restrictive land use regulations. On the other hand, this remedy would not chill the government's ability to regulate; rather it would encourage the government to make a more careful, more thorough cost-benefit analysis of the overall impact of the contemplated regulation. The principle enunciated by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon supra that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter way than the constitutional way of paying for the change" is just as applicable today. The Court should take this opportunity to

affirm the decision of the 6th Circuit and make compensation a viable remedy for landowners whose property has been "taken" by land-use regulation.

Respectfully submitted,

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